injurious to the health of employes. The decisions in those cases argued on this basis speak loudly for the effectiveness and wisdom of this method of advocacy. In *People* v. *Schweinler Press,* 214 N. Y. 395, 410, 108 N. E. 639, overruling *People* v. *Williams,* 189 N. Y. 131, 81 N. E. 778, the court states that when the previous case was decided it did not have the benefit of scientific data on the subject, and now that it has before it the result of research as to the proper hours for labor, it is prepared to reach an opposite conclusion from that expressed in the prior case. Is it too much to say that the *Lochner* case would have been differently decided had the court been properly presented with scientific data bearing on the unhealthfulness of more than ten hours labor per day in bakeries?

As the court regarded the law as one regulating the hours of service and not wages, it had no difficulty in disposing of the second ground of appeal, i. e., that the law violates the "equal protection" clause of the fourteenth amendment in that it makes the employer in a mill, factory, or manufacturing establishment pay more for labor than other employers are required to pay. But the court having reached the determination that the effect of the law was not to regulate wages, an argument based on that assumption must fall along with its premise. Regarding the law as a regulation of hours of labor, there is sufficient basis for the classification adopted by the legislature.

It is worthy to note that the Chief Justice, Justice VAN DEVANTER and Justice MCREYNOLDS dissented. As no dissenting opinion was published, the reviewer refrains from attempting to state the exact grounds of their dissent. Justice BRANDEIS, having been interested in the preparation of brief for the defendant in error, took no part in the consideration or the decision. The brief filed by the defendant in error is voluminous and exhaustive, apparently all the scientific data and opinion on the question of the disadvantages of long hours of labor having been set forth. See also 18 YALE L. JOURNAL 454; 29 HARV. L. REV. 353; 15 MICH L. REV. 259. W. L. O.

THE MATERIALMAN'S LIEN AND THE TITLE OF THE TRUSTEE IN BANKRUPTCY. —§47a(2) of the BANKRUPTCY ACT as amended in 1910, gives the trustee the rights of lien creditors over property in the custody of or coming into the custody of the bankruptcy court, and of judgment creditors holding an execution duly returned unsatisfied over property not in the court's custody. Despite this section, the New York Court of Appeals decided in the recent case of *Gates* v. *Stevens Construction Co.,* 115 N. E. 22, that a materialman who had furnished materials to a bankrupt prior to the filing of the petition and adjudication, and who had filed notice of his lien after such adjudication but within the statutory period is entitled to his lien, and that the trustee in bankruptcy, in taking title to moneys due to the bankrupt, takes title subject to the materialman's lien.

In New York and in most, if not all, of the states, the materialman, by filing notice within the statutory time, perfects his equitable lien, which begins in inchoate form when the first material is furnished. A general assignee for the benefit of creditors, having no greater right than the assignor

himself, takes subject to the materialman's lien, filed subsequent to the assignment but within the statutory period. *John P. Kane Co.* v. *Kinney,* 174 N. Y. 69, 66 N. E. 619. The trustee in bankruptcy, prior to the 1910 amendment of §47a(2), had no greater rights under §70, as against the materialman, to money due the bankrupt, than had the bankrupt himself. *Crane Co.* v. *Pneumatic Signal Co.,* 94 App. Div. 53, 56, 87 N. Y. Supp. 917, 919; *York Mfg. Co.* v. *Cassell,* 201 U. S. 344. The materialman's lien is not obtained through legal proceedings, and hence cannot be set aside by the trustee under §67f. REMINGTON, (2nd Ed.), §1155.

The court in the instant case assumes in its decision that the money payable to the bankrupt and subject to the materialman's lien was not in the actual custody of the bankruptcy court, but that there was a mere right to recover the money, and—following the majority decision in *Hildreth Granite Co.* v. *City of Watervliet,* 161 App. Div. 420, 146 N. Y. Supp. 495—that this right is not intended to be covered by the first provision of the amendment of §47a(2), but comes explicitly within the second provision, under which the trustee has only such a claim as is possessed by a creditor with execution returned unsatisfied, namely, a right by the commencement of an action to establish an equitable lien.

In *York Mfg. Co.* v. *Cassell,* supra, decided in 1906, it was held that a vendor under a conditional contract of sale, which under the Ohio law was void as against creditors and purchasers in good faith because not filed, but good as between the parties thereto, could hold the property against a trustee in bankruptcy, as the latter was in no better position than the bankrupt at the time of adjudication. The primary intention of the 1910 amendment of §47a(2) was to do away with the effect of this decision by enabling the trustee to avoid secret and unrecorded liens.

The question involved in the instant case is whether the amendment exceeds the primary intent, and gives the trustee a lien which will prevail over that of the materialman, which at the time of adjudication had not been perfected. Two of the five judges in the *Hildreth Granite Co.* case, supra, dissented on the ground that the words "all property in the custody of or coming into the custody of the bankruptcy court" are not limited to property which has been brought into the actual physical possession of the trustee. By the adjudication all the property of every name and nature representing a money value goes to the trustee, who is a mere officer or instrument of the court, and such property is in the custody of the court, "at least so far as it is within the jurisdiction of the court and not in the custody of some other court," and hence that the trustee, before the materialman's lien was filed, had a creditor's lien within the meaning of the first provision of §47a(2) and should prevail over the materialman, whose lien was not filed till after adjudication.

The judge who delivered the majority opinion in the *Hildreth Granite Co.* case cites no authority and gives no argument in support of his position, but contents himself with an expression of his belief. The dissenting opinion, in addition to the argument just preceding, relies on the statement from *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 191, that an "adjudication

follows as a matter of course, and brings the bankrupt's property into the custody of the court for distribution among his creditors." Both the argument and authority relied on in the dissenting opinion seem sound, putting a debt on the same footing as property brought into the actual physical possession of the trustee, that is, it brings them within the operation of the first provision of §47a(2).

§67 of the original act subrogated the trustee to a lien in fact acquired by the creditor by legal or equitable proceedings within the four months' period. The class of cases, unprovided for by the original act, and intended to be reached by the 1910 amendment, was that in which no creditors had acquired liens by legal or equitable proceedings, and to vest in the trustee, for the interest of the creditors, the potential right of creditors with such liens. *In re Bazemore,* 189 Fed. 236, 26 A. B. R. 494; *In re Calhoun Supply Co.,* 189 Fed. 537, 26 A. B. R. 529. Chapter 33, §5, of the Consolidated Laws of New York (1909), the statute governing the principal case, gives to those furnishing state or municipal corporations with labor or materials for public improvements a lien upon the "moneys of the state or such corporations applicable to the construction of such improvement."

If it be assumed that the dissenting opinion in the *Hildreth Granite Co.* case is correct and that debts are on the same footing as tangible property in the trustee's physical possession, the question then arises whether the creditor's lien possessed by the trustee should prevail over the materialman's lien perfected after adjudication. Had the lien been perfected prior to the accrual of the trustee's lien, even though within the four months' period, it would have come within the exception of clause (d) of §70, which provides that "liens given or accepted in good faith and not in contemplation of or in fraud of this act, and for a present consideration, which have been recorded according to law if recording thereof is necessary in order to impart notice, shall not be affected by this act." *Moreau Lumber Co.* v. *Johnson,* 29 N. D. 113, 150 N. W. 563; REMINGTON, §1155.

But even though a creditor's lien is superior to the materialman's unperfected lien, every reason exists for protecting the latter where the lien is not filed till after adjudication—if within the statutory period—as well as where it is filed before adjudication. The theory is that the newness of the work gives notice for ninety days, after which recording is necessary as a reminder of the rights of the materialman. In the language of the majority opinion in *Hildreth Granite Co.* v. *Watervliet,* a contrary interpretation "would require a materialman, in order to protect his rights, to file a new lien immediately after each load of material furnished, lest the contractor might file a petition in bankruptcy and defeat his rights." S. D. F.